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IN THE

Supreme Court of the United States

OCTOBER TERM 1946

No. 1231

PHILIP FRIED and GEORGE NEARY,
Petitioners,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

J. BERTRAM WEGMAN,
Counsel for Petitioners.

INDEX

PAGE

PETITION FOR WRIT OF CERTIORARI 1

A—Summary Statement of the Matter Involved 1

B—Jurisdictional Statement 5

C—The Questions Presented 6

D—Reasons Relied Upon for the Allowance of the Writ 6

BRIEF IN SUPPORT OF PETITION 9

Opinion Below 9

Jurisdiction 9

Statement 10

Statute Involved 11

Specification of Errors Assigned 11

POINT I—A valid waiver of the immunity against unreasonable seizures may not be secured from one unconstitutionally arrested and deprived of the demanded right to counsel 12

POINT II—Additional reasons invalidating the seizures 16

CONCLUSION 18

CASES CITED

	PAGE
Adams v. United States, 317 U. S. 269	15
Aetna Insurance Co. v. Kennedy, 301 U. S. 389	17
Amos v. United States, 255 U. S. 313	7, 8, 16
Bell v. Hood, 90 L. Ed. (Adv. Op.) 758	13
Glasser v. United States, 315 U. S. 60	15
Go-Bart Co. v. United States, 282 U. S. 344	12, 16
Gooch v. United States, 82 F. (2d) 534	13
Johnson v. Zerbst, 304 U. S. 458	17
Lefkowitz v. United States, 285 U. S. 452	13
Malinski v. New York, 324 U. S. 401	7
McNabb v. United States, 318 U. S. 322	7, 15
Nueslein v. Dist. of Col., 115 Fed. (2d) 690	7
People ex rel. Burgess v. Riseley, 13 Abb. N. C. 186, 1 N. Y. Crim. Rep. 492	14
People v. Taylor, 159 Misc. (N. Y.) 536	12
Powell v. Alabama, 287 U. S. 45	15
Silverthorne Lumber Co. v. United States, 251 U. S. 385	17
United States v. Haberkorn, 149 F. (2d) 720	13
United States v. Heitner, 149 Fed. (2d) 105, cert. den. 90 L. Ed. (Adv. Op.) 39	7, 15
United States ex rel. King v. Gokey, 32 F. (2d) 793	12
United States v. McCunn, 40 F. (2d) 295	12
United States v. Pollock, 64 Fed. Supp. 554	12
United States v. Ruroede, 220 Fed. 210	12
Weeks v. United States, 232 U. S. 383	18
Williams v. Kaiser, 323 U. S. 471	15
Wood v. United States, 128 Fed. (2d) 265	14

STATUTES, ETC.

5 U. S. C., Section 300(a)	11, 13
Rules of Criminal Procedure, Rule 41(b)	13

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully represent:

A

Summary Statement of the Matter Involved

Petitioners applied to the United States District Court for the Southern District of New York for an order (1) directing the return and suppression of books and records

unconstitutionally seized, and (2) directing the suppression as evidence of confessions illegally obtained. The District Court, after hearing testimony, filed an opinion, and denied the application insofar as it was for the return and suppression of the books and records. It dismissed the application insofar as it was for the suppression of confessions, as premature. No indictment of petitioners has been filed.

Petitioners appealed to the Circuit Court of Appeals for the Second Circuit. On February 25, 1947, the Circuit Court of Appeals filed its opinion and judgment by which (one judge dissenting) it reversed the determination of the District Court regarding the application to suppress confessions, and remanded the matter for further proceedings. However, it affirmed the decision of the District Court insofar as it related to the searches and seizures, with the following statement:

> "Substantial testimony, the credibility of which was, of course, for the district judge to determine, sustains his conclusion that such authorized voluntary consent was given to the searches as to validate them and the seizures."

Petitioners filed a petition in the said Circuit Court of Appeals in due course on March 11, 1947, praying for a rehearing insofar as the District Court's decision had been affirmed. This petition was denied on March 12, 1947.

The facts may be briefly stated as follows: On August 21, 1946, a complaint was laid before a United States Commissioner by a Special Agent of the Federal Bureau of Investigation, which alleged that petitioners were guilty of illegal possession of rubber stolen from foreign commerce. The complaint stated that its allegations were made "upon information and belief" and that "the sources of deponent's information and the grounds of his belief are an investigation conducted by him in the course of his

official duties" (R. 219-220). It is set forth at length in the Circuit Court of Appeals' statement of the case preceding its opinion. A warrant to arrest was issued by the Commissioner upon this complaint, on that day, August 21, 1946.

Petitioner Philip Fried operated a rubber cement plant under the registered trade name of Special Formula Chemical Co. at 400 West 219th Street, New York City (R. 46). A portion of the premises was used for the manufacture of the cement; another portion consisted of offices (R. 49). Petitioner George Neary (Nierenberg) was the sales manager of the company (R. 46).

At 4:30 P. M. on September 17, 1946, fifteen armed FBI Agents entered the above premises through various entrances and arrested Neary and three other employees upon the above warrant (R. 122-124). Fried was absent. Two agents immediately left (R. 124), and apprehended Fried at his home a half hour later, and took him to the FBI office (R. 4-5).

Neary's person was twice searched for weapons by different agents immediately following his arrest (R. 157, 171). He asked the agents if he could use the telephone and call a lawyer, but permission was refused (R. 52).

He was then asked by the agent in charge, Cox, "What is your attitude to us making these arrests in this plant and possibly examining the premises?" According to Agent Cox, Neary replied, "We have nothing to conceal here and I want you to search the plant and find that out for yourself" (R. 125).

There ensued a thorough search of the manufacturing portion of the premises, which took about one hour (R. 126). Neary accompanied the agents upon this search, in which nothing was found except some rubber which turned out not to be stolen (R. 144).

During this search, and while Neary was away from the office portion of the premises, other agents interviewed the company's bookkeeper and required her to produce from

the safe the purchase book and examined the contents thereof (R. 184, 191).

Upon the agents' return with Neary from the factory portion to the office portion of the building, they produced a printed "consent to search," which they explained gave them authority to take anything they desired, and asked Neary to sign it, explaining (they say) that he did not have to sign. He signed it (R. 161-162).

There ensued a thorough search of the offices, lasting three-quarters of an hour, and resulting in the seizure of most of the books of account and records of the company (R. 181-182, 132).

At about 7.30 P. M., the agents removed Neary to the FBI offices (R. 164) where he and Fried (and four employees) remained in the custody of the FBI, being interrogated until 5 A. M. the next morning, and, after a brief interval for sleep, until 2 o'clock in the afternoon, when they were arraigned before the Commissioner (R. 14-16). During this interval, on the morning of September 18th, other FBI agents returned to petitioners' premises, required the bookkeeper to produce certain other books of the company and took them to the FBI offices (R. 116-117).

Neary contradicted the agents' testimony that he invited them to search the plant, and that he consented willingly to the seizure of the books and records (R. 53, 55, 75, 76, 57). He said he had signed the "consent to search" only after the search had been concluded, and then by reason of fear, and ignorance of his rights (R. 59, 92-93).

There was testimony that in June, 1946, FBI agents, who had been inspecting the establishments of several rubber consumers, seeking to locate the stolen rubber, had so informed Philip Fried, and had requested and obtained from him permission to inspect his plant for that purpose at that time, and had done so, Fried telling them then "the plant was open for inspection at any time" (R. 120-121). No stolen rubber was found that time either (R. 139).

The District Court's finding regarding the seizure of September 17th was:

> "That neither fear nor submissiveness induced the undenied consent, but that experience and a motive to give the appearance of innocence, in the security in which he believed himself to be, combined to induce Nierenberg to give actual and voluntary consent to the search" (R. 224).

FBI Agent Cox gave the following significant testimony: When he left the FBI office on September 17, 1946, to arrest the petitioners, he intended, if possible, again to look for the stolen rubber at the plant; he thought the rubber might be there and that is why he went there; he brought with him the printed form of the "consent to search" (R. 138-139); he selected the date for the raid and the time of day (R. 142); his failure to ask Neary to sign the "consent" until after the plant had already been searched, was not accidental but was deliberate (R. 145); having, as he thought, found some of the rubber, he was determined to have the "consent" signed before seizing any records (R. 149); he never explained to Neary that he had a right not to have the place searched, nor was Neary advised of his constitutional rights in that connection (R. 145-146).

B

Jurisdictional Statement

The jurisdiction of this Court is invoked under Title 28 U. S. C. Section 347(a); Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925; and Rule 37(b) of the Rules of Criminal Procedure effective March 21, 1946.

This Court by order of March 25, 1947, extended petitioners' time to apply for a writ of certiorari until April 11, 1947.

C

The Questions Presented Are:

The principal question presented is:

1. Whether Federal officers having arrested a layman upon an unconstitutional warrant, and thereby deprived him of his liberty without due process, and having also deprived him of a demanded right to counsel, may secure from him a valid waiver of the constitutional immunity against unreasonable searches and seizures.

Subsidiary questions presented are:

2. Whether an employee, by an application of the doctrine of implied agency, may be held to have waived his principal's immunity against unreasonable seizures, when the principal is illegally in the custody of Federal officers at the time but his personal waiver is not solicited by them, and was not obtained.

3. Whether federal seizure of a business record may be justified by a consent solicited and given *after* the officers have first examined the contents of the record without any permission.

4. Whether a consent to search given to arresting officers will justify a subsequent search and seizure made the following day by other officers while the arrested person is elsewhere in custody.

D

Reasons Relied Upon for the Allowance of the Writ

The District Court held, and the Circuit Court of Appeals affirmed the decision, that the warrant upon which petitioners were arrested was issued in violation of the

law and the Constitution, and that the arrests were illegal, and not in any way justifiable.

The uncontradicted evidence also showed that the petitioner Neary's request to consult a lawyer was refused.

Nevertheless, it was held below that under these circumstances the arresting officers secured from Neary a valid waiver of the constitutional right against unreasonable searches and seizures. This is a novel ruling in constitutional law. No similar case has been found. The decision is not in harmony with this Court's decision in *Amos* v. *United States*, 255 U. S. 313, wherein it was held that Government officers wrongfully acting under color of right could not obtain from the person subjected to this false show of authority an effective waiver of his right against unconstitutional seizures.

It also conflicts with the principle laid down by this Court in *McNabb* v. *United States*, 318 U. S. 322, that federal agents may not obtain a valid confession by violating a federal statute. In this case, it has been held that they may obtain a valid waiver of one constitutional right by violating several other constitutional rights. "The Constitution does not thus nullify its own terms, setting them at war with each other." *Malinski* v. *New York*, 324 U. S. 401, 423.

Nor can the decision be reconciled with the decision of the same Circuit Court of Appeals in *United States* v. *Heitner*, 149 Fed. (2d) 105, cert. den. 90 L. Ed. (Adv. Op.) 39 that an illegal arrest will render incompetent a voluntary admission made by the arrested person, or with the similar decision of the Court of Appeals for the District of Columbia in *Nueslein* v. *Dist. of Col.*, 115 Fed. (2d) 690.

It is no exaggeration to say that the doctrine now enunciated by the Court below opens the door to the police methods of totalitarian states. The terrifying efficiency of such methods and the logical result of the doctrine are here apparent. An unjustifiable arrest followed by unconstitutional custody *incommunicado* can be expected to result in subsequent alleged "waivers" of rights, and "voluntary" confessions. All that is then needed is an easy

complaisance by the courts in any plausible tale later told by the police officers to eliminate the last vestiges of constitutional safeguards against oppression.

The Court below has also here held that federal officers, having both a principal and his agent in their custody, may resort to the agent for a waiver of the principal's constitutional rights, and thereafter justify such waiver as authorized by an implied agency, although at the time of eliciting the waiver, they avoided ascertaining the principal's disposition concerning it. It is a fair inference that at the time of the search, the officers were not sanguine concerning the "authorization", which the Court below infers to have existed. This is a doubtful extension of the law of agency into the field of guaranteed constitutional immunities which should be reviewed. It has not been decided by this Court, the question having been left open in *Amos* v. *United States*, 255 U. S. 313, a less extreme situation, since there the principal was not available.

WHEREFORE, petitioners pray that a writ of certiorari may issue out of and under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court for review and determination as provided by law, this cause and a complete transcript of the record and all proceedings had herein; and that the order of the said United States Circuit Court of Appeals insofar as it affirmed the District Court's order in this case may be reversed, and that petitioners may have such other relief as this Court may deem appropriate.

Dated: New York, New York, April 10, 1947.

PHILIP FRIED,
GEORGE NEARY,
Petitioners,

By J. BERTRAM WEGMAN,
Counsel for Petitioners.

IN THE

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion Below

The Court below rendered an opinion, a certified copy of which is annexed to the record submitted herewith. The opinion is not yet officially reported.

Jurisdiction

The judgment affirming in part the decision of the District Court was handed down on February 25, 1947.

The decision denying the petition for rehearing was handed down on March 12, 1947.

This Court's order extending, until April 11, 1947, petitioners' time to apply for a writ of certiorari is dated March 25, 1947.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925; Section 347(a), Title 28, U. S. C.; and Rule 37(b) of the Rules of Criminal Procedure effective March 21, 1946.

Statement

The factual situation disclosed by the FBI agents' testimony, which was accepted by the District Court, may be summarized as follows: The agents' principal purpose in raiding the plant September 17, 1946, was to make a search and seizure; the arrests were merely incidental to this purpose. Under color of the authority of an invalid arrest warrant, issued some three weeks before, they gained entrance to the premises and arrested Neary. They searched his person; he asked permission to call a lawyer, which was refused. After subjection to this false show of authority, Neary, an employee, invited a search "of the plant". During the ensuing search of the plant, the owner himself was illegally apprehended at home. Although he was in the custody of the FBI, the owner's consent to the subsequent seizure of his business records was not solicited, nor was he told what was about to take place. Instead, the employee, Neary, was asked to sign a consent to the search and seizure of Fried's records. Neary was not requested to sign such a consent until *after* the agents had already secured from the bookkeeper the principal record, the purchase book, and examined it in Neary's absence. Upon the following morning, both the owner and the employee being illegally in custody and absent being interrogated, and no request for permission being made to either, the agents took additional records apparently overlooked the previous night.

Statute Involved

Section 300(a), Title 5, U. S. C.:

"Sec. 300a. Federal Bureau of Investigation; authority of officers to serve warrants and make arrests; authority to carry arms.

The Director, Assistant Directors, agents, and inspectors of the Federal Bureau of Investigation of the Department of Justice are empowered to serve warrants and subpoenas issued under the authority of the United States; to make seizures under warrant for violation of the laws of the United States; to make arrests without warrant for felonies which have been committed and which are cognizable under the laws of the United States, in cases where the person making the arrest has reasonable grounds to believe that the person so arrested is guilty of such felony and where there is a likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be immediately taken before a committing officer. Such members of the Federal Bureau of Investigation of the Department of Justice are authorized and empowered to carry firearms. June 18, 1934, c. 595, 48 Stat. 1008; Mar. 22, 1935, c. 39, Title II, 49 Stat. 77."

Specification of Errors Assigned

The Circuit Court of Appeals for the Second Circuit erred:

1. In holding that a valid waiver of the right against unconstitutional seizures may be obtained from a layman illegally arrested and deprived of a demanded right to counsel.

2. In holding that a valid waiver of a principal's constitutional right against unreasonable searches may be obtained from his agent, without the principal's knowledge,

by Government officers who have both principal and agent in their custody.

3. In holding that federal officers, after wrongfully examining a book, may utilize the knowledge so obtained to secure a consent which will justify its subsequent seizure.

4. In holding that a consent given at the time of arrest to a search of the premises where the arrest takes place will justify a second search thereof on the succeeding day.

POINT I

A valid waiver of the immunity against unreasonable seizures may not be secured from one unconstitutionally arrested and deprived of the demanded right to counsel.

1. *The Illegal Arrest.* The District Court properly concluded that the arrest of petitioners was illegal (R. 219-221). The Circuit Court of Appeals reproduced this portion of the District Court's opinion in its statement of the case, with apparent approval thereof. The arrest warrant was issued upon a complaint, the allegations of which were said to be "upon information and belief", and the sources of this information and belief were not disclosed, except by the generalization that they were "an investigation conducted [by the FBI agent] in the course of his official duties". Such a complaint will not support a warrant. *Go-Bart Co.* v. *United States,* 1930, 282 U. S. 344; *United States* v. *Ruroede,* 220 Fed. 210; *United States* v. *McCunn,* 40 F. (2d) 295; *United States ex rel. King* v. *Gokey,* 32 F. (2d) 793; *United States* v. *Pollock,* 64 Fed. Supp. 554; *People* v. *Taylor,* 159 Misc. (N. Y.) 536. It offends against the provision of the Fourth Amendment that "no warrants shall issue, but upon probable cause * * *." Here the determination as to the existence of "probable cause" was necessarily made by the police officer, and not by the magistrate.

Nor could the arrests be justified, independently of the warrant, as made upon reasonable grounds to believe a felony had been committed. For the statute governing arrests by FBI agents provides that arrests without warrant may only be made by them "where there is a likelihood of the person escaping before a warrant can be obtained for his arrest * * *". Title 5, U. S. C., Sec. 300a; *United States* v. *Haberkorn,* 149 F. (2d) 720 (C. C. A. 2, 1945); cf. *Gooch* v. *United States,* 82 F. (2d) 534, 538 (C. C. A. 10, 1936). The District Court found that there was no evidence of any such likelihood (R. 221). It therefore excluded as irrelevant any interrogation of the agents by the petitioners to ascertain whether they had any reasonable grounds to believe petitioners guilty of a felony (R. 140).

Having been illegally arrested, the petitioners were being deprived of their liberty without due process of law, in violation of the Fifth Amendment. Cf. *Bell* v. *Hood,* 90 L. Ed. (Adv. Op.) 758.

The District Court's consideration of the illegality of the arrest (and, so far as appears, the Circuit Court of Appeals') was prompted by the erroneous belief that the seizures might have been justified as incidental to a lawful arrest, if the arrest had proved to be lawful. But even if the arrest had been lawful, it would only have justified the seizure of the "instrumentalities of crime", in this case, the stolen rubber. It would not have conferred the right to seize that for which a search warrant could not have been obtained. *Lefkowitz* v. *United States,* 285 U. S. 452, 467. And see Rule 41(b), Rules of Criminal Procedure, which authorizes the issuance of a search warrant only for property "stolen or embezzled in violation of the laws of the United States; or designed or intended for use or which is or has been used as the means of committing a criminal offense". Such a characterization scarcely fits the books of account of a legitimate business.

Thus the Courts below appear to have misconceived the true significance of the illegal arrest, viz., its bearing upon the validity of the consent resorted to as justification for the seizures.

2. *The Denial of Counsel.* When arrested, Neary asked the agents if he could use the telephone and call a lawyer, but permission was refused. This is mentioned in the Circuit Court of Appeals' statement of the case as one of the uncontroverted allegations in the affidavits originally filed. Neary's testimony to that effect at the hearing was also not controverted, although nine of the agents either testified or filed affidavits. The likelihood that such a request was made is emphasized by agent Cox's testimony that as they were leaving the premises, when the search was completed, Neary asked a fellow employee, who had not been arrested, to get in touch with his attorney (R. 135, and see R. 205).

The refusal of the request to telephone a lawyer preceded the alleged invitation to search the plant, and the consent to the seizure of the books. May officers who intend to solicit a waiver of a constitutional right effectively smooth the path to this objective by denying the assistance of counsel to the one who is to make this weighty decision? The Sixth Amendment gives the right to the accused to have the assistance of counsel for his defense. This right is not limited to proceedings after indictment. In so holding in *People ex rel. Burgess* v. *Riseley* (1883), 13 Abb. N. C. 186, 1 N. Y. Crim. Rep. 492, the Court said that: "To give life and effect, therefore, to the provision of the Constitution, it must be held to confer upon the relator every privilege which will make the presence of counsel upon the trial a valuable right * * *. He has rights even before indictment. He may claim, perhaps, that detention is illegal * * *." And in *Wood* v. *United States*, 128 Fed. (2d) 265, 271 (App. D. C., 1942), it was said that: "The aid of counsel in preparation would be farcical if the case could be foreclosed by preliminary inquisition which would

squeeze out conviction or prejudice by means unconstitutional if used at the trial." If an illegally arrested layman can be procured validly to waive his immunity against unconstitutional seizures, after having demanded and been refused advice of counsel, the subsequent assistance of counsel at his trial will be merely illusory.

The District Court thought the waiver valid, because Neary was "a citizen of substance and means * * * a man of affairs * * *". But this Court has noted in *Powell* v. *Alabama*, 287 U. S. 45, 69, and in *Williams* v. *Kaiser*, 323 U. S. 471, 475, that "Even the intelligent and educated layman has small and sometimes no skill in the science of law * * *" and "requires the guiding hand of counsel at every step in the proceedings against him". The Court below seems to have indulged in the "nice calculation" as to the amount of prejudice arising from the denial of counsel, which was forbidden in *Glasser* v. *United States*, 315 U. S. 60, 76.

3. *The Waiver of Constitutional Immunity.* If this Court found it necessary to consider in *Adams* v. *United States*, 317 U. S. 269, whether a layman who had *waived* his right to counsel could thereafter validly waive his right to jury trial, how much more necessary is review of the doctrine now enunciated by the Court below, that a valid waiver of his immunity against unreasonable seizures may be obtained from a layman *deprived* of counsel, and unconstitutionally arrested? If the confessions in *McNabb* v. *United States*, 318 U. S. 322, were vitiated because obtained by means of FBI agents violating the statute governing them, how can the waiver of a constitutional immunity be sustained which is obtained by wholesale disregard of other constitutional limitations?

The Circuit Court of Appeals had held in *United States* v. *Heitner*, 149 Fed. (2d) 105 (C. C. A. 2, 1945), cert. den. 90 L. Ed. (Adv. Op.) 39, that it was an inevitable inference that an admission made after arrest resulted therefrom, in the sense that the prisoner would not have answered

the questions, had he had not been in custody. Whence it was said that the illegality of the arrest became relevant to the competence of the evidence. But Neary's consent to the seizure of the books resulted just as inevitably from his arrest. There would have been no occasion for his alleged "motive to give the appearance of innocence" were it not for the "lawless invasion of the premises" by the agents. *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 358.

POINT II

Additional reasons invalidating the seizures.

1. *Waiver of Constitutional Immunity by an Agent.* The justification for the seizure of Fried's books and records in violation of his constitutional immunity is a consent or waiver of such immunity by his employee Neary. The Government maintained in the Court below that Fried and Neary were partners, but neither the District Court nor the Circuit Court of Appeals so found. The District Court applied the doctrine of implied agency, finding from the evidence that Neary, the manager, was "authorized" to waive Fried's immunity. This Court in *Amos* v. *United States,* 255 U. S. 313, left open the question whether it is possible for a wife, in the absence of her husband, thus to waive his constitutional rights, as unnecessary to its decision, because her consent had been obtained by Government officers illegally acting under color of right. The Court below disregarded the holding of that case, and went on to decide the question left open. Here the circumstances militating against the application of the doctrine of implied agency are particularly strong, for the justification of necessity does not exist. Fried was in the FBI's custody, but they avoided asking him for the waiver, evidently preferring to secure it from his employee. Surely the officers may not thus deliberately re-

frain from ascertaining the principal's disposition, and then seek to justify the agent's act as impliedly authorized by him. The Courts must indulge every presumption against the waiver of constitutional rights. *Johnson* v. *Zerbst,* 304 U. S. 458, 464; *Aetna Insurance Co.* v. *Kennedy,* 301 U. S. 389, 393.

2. *An Illegal Search Preceded the Alleged Consent.* Neary, the agent said, invited him to "search the plant" (R. 125). Such a search for rubber was made, but the agents clearly did not consider this an invitation to examine or take the books and records of the company, for the agent in charge says he made no search of the documents in the company office until obtaining the later written consent from Neary (R. 131, 149). But the other agents testified that during the search of the manufacturing portion of the premises, and prior to the execution of the written consent, they had examined the purchase book of the company and questioned the bookkeeper concerning it (R. 184, 191). This was done in the office portion of the premises while Neary was accompanying the agent in charge on his search of the factory. That Neary subsequently signed a consent to search and seize *in futuro* did not correct the wrongful examination of the book which had already taken place. The knowledge of the agents that it would be advisable to secure a consent to the seizure of the book obviously stemmed from the previous examination of the book. Cf. *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385.

3. *The Alleged Consent Did Not Justify a Second Search and Seizure on the Following Day.* Other agents came on the following morning, September 18th, Fried and Neary both being illegally in custody in the Federal Jail, and took additional books from the plant. The Circuit Court of Appeals held that this seizure also was justified by the consent obtained the previous day from Neary. Apart from the fact that this interpretation of

the consent is contrary to its express terms (Government's Exhibit 1, R. 212, offered R. 99), for it only purported to authorize a search at the time of arrest by two named agents, it is a patently dangerous doctrine to hold that a consent given by an arrested person at the time of his arrest to search the premises where the arrest occurs opens those premises to repeated searches by Government agents for an indefinite length of time thereafter. In that case, there would be no way to determine when, if ever, the petitioner would regain his constitutional immunity with respect to those premises. Cf. *Weeks* v. *United States*, 232 U. S. 383, holding that the right to search incidental to a lawful arrest does not continue past the time of its justification.

CONCLUSION

For the above reasons, the writ of certiorari should be granted.

Respectfully submitted,

J. Bertram Wegman,
Counsel for Petitioners.

Richard J. Burke,
of Counsel.

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On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

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PETITIONERS' REPLY BRIEF

J. BERTRAM WEGMAN,
Counsel for Petitioners.

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CASES CITED

	PAGE
Glasser v. United States, 315 U. S. 60, 76	3
Nueslein v. Dist. of Col., 115 Fed. (2d) 690	3
United States v. Heitner, 149 Fed. (2d) 105	3

STATUTE CITED

United States Code, Section 53a, Title 18	2

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PETITIONERS' REPLY BRIEF

The Government by misstating the question (Br. p. 2) seeks to make it appear that petitioners desire to review the finding of fact that Neary consented to the seizure. But what petitioners are urging is a pure question of law arising out of this finding, viz., can officers secure a consent which the law will regard as valid from one whom they have unconstitutionally arrested and are depriving unconstitutionally of his liberty? Furthermore, can a valid consent be obtained from one so detained who is denied his request for an opportunity to consult counsel before consenting?

The Government says that the admitted invalidity of the warrant bears no causal relation to the consent (Br. p. 12). The Government twice speaks of the search and seizure as "incident to the arrest" (Br. pp. 2, 5), apparently seeking thus to impart an atmosphere of legality to what took place. But the law has never justified searches as incidental to an *unlawful* arrest. And this error highlights the Government's fundamentally wrong point of view, for the agents were trespassers, they had no right at all to be on the premises, much less to arrest those they found there. They were committing a crime (Sec. 53a, Tit. 18 U. S. C.) as well as violating the petitioner's constitutional rights. What happened thereafter was vitiated *ab initio,* unless the end justifies the means.

In other words, the Government claims that it may be brushed aside as inconsequential that the person consenting is under illegal arrest (though he is misled into believing himself legally arrested) and is unconstitutionally deprived of liberty. Can it seriously be maintained that even if no arrest had been made, Neary would just as probably have turned over the company's books and records to be carried away by the FBI? No one can know this, but it seems at least highly unlikely. Human experience does not show that businessmen who are willing to have their plants inspected for stolen goods are equally willing to turn over all their books and records.

Even a legal arrest has an obvious effect on the mind of the arrested person. This is not to say that his subsequent statements or acts are therefore involuntary. But they are at least partially *motivated* by the situation in which he finds himself. If the arrest is legal, the fact that the arrested person may be serving what he considers his best interests under those circumstances will not vitiate his acts or statements. The arresting officers are doing no wrong.

But where the arrest is illegal and unconstitutional, the arrested person is laboring under a set of circumstances wrongfully created by the officers in violation of his

rights,—his consent is given in a wrong and misleading context, since the agents are acting under color of right, and he believes himself to be validly under arrest. Courts should not then be permitted to indulge in a "nice calculation" (forbidden in *Glasser* v. *United States,* 315 U. S. 60, 76) as to the *amount* of influence the constitutional violation had upon his mind.

That confessions or admissions are more likely to be secured from an arrested than from a free person is obvious, and common knowledge. This led Judge Learned Hand to say in *United States* v. *Heitner,* 149 Fed. (2d) 105, that "It is a reasonable—indeed an inevitable—inference that the admission resulted from the arrest in the sense that Cryne would not have answered, had he not been in custody." He did not mean that that would vitiate the admission, if the arrest were legal—but only that if the arrest were illegal, a quantum of the causality of the admission would be the officer's own illegal act, and this would make it incompetent. And in *Nueslein* v. *Dist. of Col.,* 115 Fed. (2d) 690 (App. D. C., *per* Vinson, J.), it was felt that a voluntary admission obtained by means of an unconstitutional search should be excluded. This must be so, unless the officers' unlawful acts can be allowed to profit them in the end. But if this is true of confessions or admissions, why should it be less true of consents or waivers?

Why should a waiver of a constitutional right be held effective, which, if it had been instead an admission or confession, would have been rendered incompetent? A statement of consent to search does not differ essentially from an admission, but it may have far more prejudicial consequences.

Respectfully submitted,

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Rule involved	2
Statement	3
Argument	11
Conclusion	18

CITATIONS

Cases:

Adams v. *United States ex rel. McCann*, 317 U. S. 269 12

Rule:

Rule 41 of the Federal Rules of Criminal Procedure:

(e) 2

741936—47——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1231

PHILIP FRIED AND GEORGE NEARY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 229–255) are not yet reported; there was no dissent, however, on the points raised by the petition for a writ of certiorari in this proceeding. The opinion of Judge Rifkind in the district court (R. 214–224) is reported at 68 F. Supp. 961.

JURISDICTION

The judgment of the circuit court of appeals was entered February 25, 1947 (R. 255–256), and

a petition for rehearing (R. 257–262) was denied March 12, 1947 (R. 263). On March 25, 1947, an order was entered by Mr. Justice Jackson extending through April 11, 1947, the time for filing the petition (R. 264). The petition for a writ of certiorari was filed April 11, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The principal question presented is whether petitioner Neary intelligently and competently consented to the search and seizure which was made as an incident to his arrest.

RULE INVOLVED

Rule 41 of the Federal Rules of Criminal Procedure provides in pertinent part as follows:

* * * * *

> (e) *Motion for Return of Property and to Suppress Evidence.*—A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the

grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

On October 16, 1946, petitioner Fried applied to the United States District Court for the Southern District of New York, both on behalf of himself and his employees, for an order directing the suppression and return of various books and records alleged to have been illegally seized from him and directing the supression of all information disclosed and admissions made to investigating agents by petitioner Fried and his employees (R. 3–22). An order to show cause issued (R. 2–3), and the Government filed answering affidavits opposing the petition and requesting, in view of the sharp disagreement in the affidavits of the parties as to the facts, that a hearing be had in open court (R. 22–45).

The matter came on for hearing before Judge Rifkind, who declined to hear evidence on the application to suppress the confessions and dismissed this aspect of the petition (R. 45–46, 214–219).[1] Evidence was adduced by both sides on the issue of the legality of the search and seizure.

It was established that petitioners are connected[2] with the Special Formula Chemical Company, a firm which manufactures rubber cement in New York City (R. 46). On August 21, 1946, an agent of the Federal Bureau of Investigation filed a complaint with the United States Com-

[1] The recitation of facts in the petition for a writ of certiorari (Pet. 4), showing the events after the search and seizure is based solely on the affidavits which were filed in support of Fried's application in the district court. That the affidavits are abundantly extravagant in describing the events which occurred is illustrated by one example which was inquired into in the hearing in the district court. Petitioner Neary's affidavit states (R. 11–12) that on September 17, when the arrests were made, "20 to 25 F. B. I. men" entered the plant and offices and "I noted that many of the men were armed, with pistols in holsters, and some held their hands on the handles of their guns." Under cross-examination at the hearing Neary testified (R. 105–107) that "I saw only one gun, but I saw two people with their hands on their hips" (R. 107). Special agent Cox testified that fifteen agents originally came to the plant, but eight left within fifteen or twenty minutes after making the arrests (R. 124), and that he did not observe any agent draw his gun or with his hand on his gun during the entire episode (R. 129).

[2] There is a factual dispute whether the firm was solely owned by petitioner Fried or whether Fried and Neary were partners (see *infra*, pp. 15–17).

missioner alleging that petitioners and others, knowing it to have been stolen, wilfully had in their possession 256 bales of crude rubber which had been stolen from a foreign shipment. Warrants issued for the arrest of the persons named. (See R. 219–220.)

On September 17, 1946, the warrants were executed. Petitioner Fried was arrested at his home (see R. 124, 4), and petitioner Neary and the others were arrested at the office and plant of the Special Formula Chemical Company (R. 123–124). As an incident to the arrests the plant and its books and records were searched and a quantity of rubber and various books and records were seized. At the time of the search and seizure petitioner Neary signed a document consenting to the search and seizure in the following terms (Gov. Ex. 1, R. 213):

> I, George Neary, having been informed of my constitutional right not to have a search made of the premises hereinafter mentioned without a search warrant and of my right to refuse to consent to such a search, hereby authorize Flemming L. Liggitt, and Eldred Wesley Cox, Special Agents of the Federal Bureau of Investigation, United States Department of Justice, to conduct a complete search of the building located at 400 West 219th St., New York City, N. Y. These agents are authorized by me to take from my residence any

letters, papers, materials or other property which they may desire.

This written permission is being given by me to the above-named Special Agents voluntarily and without threats or promises of any kind.

(Signed) GEORGE NEARY.

Witnesses:

(Signed) FLEMMING L. LIGGITT,
F. B. I., N. Y. C.

(Signed) ELDRED W. COX,
F. B. I., N. Y. C., 9/17/46.

The principal question presented by the petition for a writ of certiorari is whether the consent was freely given by petitioner Neary with understanding of its significance. Directed to this issue, the facts may be briefly summarized as follows:

On June 20, 1946, F. B. I. agents Cox and Wohl appeared at the plant of the Special Formula Rubber Company, but they were unable to locate either petitioner Fried or petitioner Neary. That night petitioners and others were at the plant all night, petitioner Neary having explained to an employee that the F. B. I. was going to inspect the plant the next day (R. 205–206, 81–82). On the following day, the agents returned to the plant and informed petitioner Fried that "we were inspecting various rubber consumers in the New York area and that we would appreciate an opportunity to go through his plant and satisfy ourselves that none of the

hijacked rubber was there" (R. 120–121). Petitioner Fried replied that "the plant was open for inspection at any time, they had nothing there that they desired to conceal" (R. 121). A fruitless search of the plant was made and upon its conclusion petitioner Fried told the agents "that any time we desired to look through his plant we should feel free to come and he would be happy to see that we went through the plant" (R. 121). Petitioner Neary was not present, but he was apprised of the search (R. 82).

On September 17, 1946, special agent Cox and fourteen other F. B. I. agents proceeded to the office and plant of the Special Formula Chemical Company, arriving between 4:20 and 4:30 p. m., to execute the warrant which previously had been issued. Petitioner Neary was immediately placed under arrest by Cox, and other agents proceeded to arrest the other persons named in the warrants. Within fifteen or twenty minutes six of the F. B. I. agents had left the plant with the persons—other than Neary—they had arrested there and two others had proceeded to petitioner Fried's home where he was taken into custody. Seven agents remained at the plant. (R. 122–124, 4.) After a quick survey of the plant to determine whether any of the stolen rubber was there (R. 123, 149), special agent Cox returned to Neary's office and asked him: "Mr. Neary, what is your attitude to us making these arrests in this plant and possibly

741936—47——2

examining the premises?" Neary replied: "We have nothing to conceal here and I want you to search the plant and find that out for yourself." (R. 125.)

With Neary accompanying them, an hour-long search of the plant was made. During the search two bales of rubber similar to the stolen rubber were found and special agent Cox told Neary that if he had no objection they would like to take the two bales and some samples of scrap rubber. Neary consented on condition that the rubber be returned if it was found to have no connection with the theft. (R. 126–127.)[3]

Upon completion of the inspection of the plant Neary returned to his office, and it was at this juncture that the consent to search form (*supra*, pp. 5–6) was signed. Special agent Liggitt testified (R. 161–162): "I took the 'consents' and asked him to read them and told him that they were 'consents to search' and to take certain items if they were discovered to be pertinent to the investigation. I told him that I was going to ask him to sign it, that I had filled in the address of the premises there. And I told him that he didn't have to sign it, and that he didn't have to give his consent in this manner, and that if he is disposed to sign it we wanted him to sign it." Petitioner Neary stated that he was willing to sign the con-

[3] It subsequently was returned, as were various books and records (R. 144).

sent form (R. 162). Liggitt asked Cox to come in and witness the signing. Cox testified that when he entered the office Neary was looking at the consent forms and that he had a pen in his hand "as though he were going to sign them" (R. 130). Cox also explained to Neary the significance of the consent forms and Neary replied that he understood and was willing to sign them (R. 130, 146, 169). And he did sign two identical forms (R. 130), which authorized the agents to search the building and to seize letters, papers, materials or other property (*supra*, p. 6).

After the written consent form was signed, a search of the office was conducted and books and records of the firm were examined. Petitioner Neary assisted the agents; on one occasion he located a book (R. 182) and on another he telephoned the firm's bookkeeper in an effort to ascertain the combination to a safe which was locked (R. 57, 115). The search was completed at between 7:00 and 7:30 p. m., and various books and records were seized (R. 132). Neary was shown the records which the agents were taking and an itemized list of them (R. 133, 190; Gov. Ex. 2, R. 214). Upon leaving the plant in custody of the special agents Neary instructed an employee to contact a specified attorney for him (R. 135), and this was done (R. 205).

On the following day two special agents returned to the firm's office and requested the book-

keeper to discuss with an F. B. I. accountant, at his office, certain entries in the books. In response to a question whether she had any of the records of purchases the bookkeper produced the journal and accounts payable ledger, which the agents took with them. (R. 116.)

Neary's testimony as to the circumstances under which he signed the consent to search differs in several respects from that of the F. B. I. agents. He testified that upon his arrest, he requested permission to contact an attorney, but this was refused (R. 52). According to his version, he submitted to the demands of the special agents and accompanied them through the plant (R. 55). The plant and the office were both searched and the various items were seized. Then, according to Neary, shortly before 7:30 p. m., when the search and seizure had been completed (R. 59), special agent Liggitt said: "I forgot something," and then tendered the consent to search forms to Neary with a request that he sign them (R. 92). Neary testified that he signed the forms without reading them: "I was afraid not to sign it. I thought I had to sign it. He told me I had to sign it because he did not have a warrant" (R. 92). He understood that the consent form authorized the agents to seize the various books and records which were taken (R. 93).

The district court concluded that petitioner Neary had freely and intelligently consented to

the search and seizure and it accordingly denied the motion to suppress the seized documents (R. 225). Upon appeal to the Circuit Court of Appeals for the Second Circuit, the order as to the motion to suppress the books and records was affirmed, but the part of the court's order dismissing the petition to suppress the confessions (see *supra*, p. 4) was reversed. The court held that if the confessions were obtained in derogation of the confessor's constitutional rights, the district court had power to suppress the confessions. Judge Augustus Hand dissented on this point. (R. 229–255.)

ARGUMENT

The petition for a writ of certiorari seeks review of that part of the judgment of the circuit court of appeals which affirmed the order of the district court refusing to suppress for use as evidence the seized books and records. For the reasons set forth below, we oppose the granting of this petition. We shall shortly file a cross-petition for a writ of certiorari seeking review of that part of the Second Circuit's judgment which holds that a district court may suppress a confession even before indictment has been returned and which, therefore, remands the case to the district court for hearing on the circumstances under which the confessions were obtained.

1. The circuit court of appeals held (R. 237; see also R. 253) that substantial testimony sus-

tains the conclusions of the district court (R. 224) that "neither fear nor submissiveness induced the undenied consent, but that experience and a motive to give the appearance of innocence, in the security in which he believed himself to be, combined to induce Nierenberg [Neary] to give actual and voluntary consent to the search." Petitioners seek to avoid this view of the facts by arguing that the consent was given after Neary had been arrested on a warrant which turned out to be invalid and after, he claims, he was denied permission to seek an attorney.[4] But, of course, the admitted invalidity of the warrant bears no causal relation to the consent that was given. And if, as Judge Rifkind held, petitioner Neary freely consented to the search and seizure in an effort to display a "we have nothing to hide" attitude fully expecting that nothing incriminating would be found, the consent is not vitiated because he did not have an attorney present at the time. Cf. *Adams* v. *United States ex rel. McCann*, 317 U. S. 269.

The crucial question is whether the admitted consent which was obtained after Neary had been

[4] Neary testified that after he was placed under arrest he asked special agent Cox "if I could use the telephone and call a lawyer." According to Neary, Cox replied: "Never mind your lawyer now. You will have plenty of questions to answer before you call a lawyer." (R. 52.) In his affidavit in opposition to the petition in the district court Cox denied that he or anyone in his presence made such a statement (R. 27).

placed under arrest was freely given or whether it was extracted from him by methods inconsistent with the constitutional guarantees. The short of the matter is that with knowledge of all the facts upon which petitioners rely, Judge Rifkind found himself compelled to reject the view of the evidence which petitioners urge, notwithstanding that at the outset, on the basis of the affidavits alone, he would have held for petitioners (see R. 223). In our view, Judge Rifkind's opinion is a full and complete answer to the arguments petitioners now urge. In enumerating the reasons why he concluded that Neary had freely consented to the search and seizure, the opinion points out (R. 223–224) that—

> (1) Nierenberg is the general manager of Special Formula Chemical Company. His earnings in 1945 from that enterprise were $20,000. He is also a co-owner of another business enterprise. I mention these facts to indicate that he is not a poor, illiterate, uninformed person, but a citizen of substance and means. He gave every impression of self-confidence, alertness, competency. He is quite the opposite of the cartoonist's representation of The Timid Soul. He is a man of affairs, accustomed to deal with persons in authority and not at all overawed by the badge of office. He conducted himself militantly and skilfully during his cross-examination.

(2) He testified falsely on some matters, and, in at least one instance, I am convinced that he did so wilfully—in the matter of his foreknowledge of official inspection of the plant in June, 1946. His previous conviction for forgery does not aid his credibility.

(3) In June, 1946, Special Formula Chemical Company had been searched by FBI agents, with the consent of Fried, and nothing of an incriminating nature had been discovered.

(4) Nierenberg felt entirely secure in consenting to a search, as there was in fact no stolen rubber on the premises, and the books revealed no acquisition of such rubber as had been stolen. He undoubtedly believed that the exhibition of an attitude of cooperation and of willingness to prove that "We have nothing to hide" would lead to the same satisfactory result as the June investigation. It is significant that the petitioners did not call Fried to contradict the testimony of Agent Cox, that during the June inspection Fried had said "that the plant was open for inspection at any time; that they had nothing there that they desired to conceal. * * * That any time we desired to look through his plant we should feel free to come and he would be happy to see that we went through the plant."

Petitioners do not deny that there is ample basis in the record for these conclusions. Two courts having evaluated the evidence, we submit that

there is no occasion for further review of it by this Court.

2. Petitioners also urge (Pet. 16–17) that Neary had no authority to authorize the search and seizure. We submit that the evidence permits the conclusion either that Neary was a partner in the firm or that he was a responsible official of the firm; in either event he had ample authority to give consent.

Neary testified on direct examination that the Special Formula Chemical Company is a sole proprietorship owned by petitioner Fried; that he is an employee who functions as sales manager; that he shares an office with Fried and another official of the firm (R. 50); that his compensation consists of one-half of the profits; that he did not contribute capital to the business, does not sign checks and does not share in any losses; and that he is a partner with Fried in another business. (R. 46–48.) On cross-examination, Neary testified that his functions consisted of doing everything that is necessary for the good of the firm (R. 63); that he hires employees and gives orders and instructions to them (R. 63, 66); that his income from the business in 1945 was $20,000, the same as Fried's (R. 66); that on occasion he has referred to Fried as his partner (R. 67); that at other times he has refused permission to persons "to go in the plant" (R. 76); and that in the course of the search of the plant he authorized an

employee to remove various tools from the plant (R. 88).

Miss Berke, the firm's bookkeeper, testified that petitioner Neary hired her for the firm and that Fried and Neary had equal authority in the operation of the business (R. 117). Another employee referred to petitioners Fried and Neary as "the two bosses" (R. 206).

These facts permit the conclusion, we think, that Neary in fact is a partner with Fried in the operation of the business, but at the very least they demonstrate that Neary shared in the general management of the business with Fried. The employees regarded him as their "boss," and he exercised the functions which are ordinarily associated with such a position. At other times, Neary admittedly had withheld approval to persons seeking to go into the plant. The power to deny leave suggests also the power to grant it, as Neary did in this case. Quite plainly, Neary was not a mere employee or a mere sales manager as he testified. Light on the question whether he was a full-blown partner undoubtedly could have been given by petitioner Fried if he had seen fit to testify. Whether or not Neary was a partner, he was a ranking official of the firm who consented to the search and seizure without any troubling doubts in his own mind as to his power to do so. The courts below properly held, we submit, that Neary possessed ample authority to

permit the search and seizure to which he consented.

3. While Neary was accompanying the special agents through the plant, another agent was interrogating the firm's bookkeeper and he was shown some of the firm's purchase records (see R. 184, 191). Petitioners now argue (Pet. 17) that this was a search which preceded the signing of the consent form and that it was therefore illegal. Similarly, on the following day, two agents returned to the firm's office and requested the bookkeeper to accompany them to an F. B. I. accountant to explain certain entries in the books and the agents asked for any records of purchases. The bookkeeper gave them the firm's journal and accounts payable ledger (R. 115–117). Petitioners urge (Pet. 17–18) that this seizure was not authorized by the consent which had been given the previous day.

The argument as to both instances is incompatible with the facts found by Judge Rifkind. Both occurrences are parts of the entire transaction. The inquiry into the firm's books on September 17th was initiated while other agents were searching the plant. The inquiry and seizure on the following day quite plainly was the completion of the search. It was not an isolated transaction occurring after the culmination of the earlier search and seizure; it was an integral, contemporary part of the initial search and seizure. If, as Judge Rifkind determined, peti-

tioner Neary willingly and freely consented to the search and seizure in an effort to convince the agents that the firm had nothing to hide, there is no basis for saying that the consent operated only prospectively and only on September 17. Neary knew that an agent had been looking at the purchase records while he was with the agents in the plant (see R. 55–56). Notwithstanding this, he buttressed his earlier oral consent by signing the written consent form. Thus, at the very least he ratified what had been done. The consent form of course, did not give the agents carte blanche to search and seize at any time in the future, but it plainly authorized the search and seizure in the course of the transaction in which it was given. The fact that the agents did not discover two books until the following morning does not, we think, exclude those books from the consent which Neary gave.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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